Supreme Court, U. S.
FILED
MAR 8 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1250

VELSICOL CHEMICAL CORPORATION, *Petitioner,*

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

EDWARD BENNETT WILLIAMS
ROBERT L. WEINBERG
HAROLD UNGAR

WILLIAMS & CONNOLLY
1000 Hill Building
Washington, D. C. 20006
(202) 331-5000
Attorneys for Petitioner

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Velsicol Chemical Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the order of the Administrator of the Environmental Protection Agency.

OPINIONS BELOW

The principal opinion of the Court of Appeals (App. A, Pet. App. 1-25),[1] and its "Supplemental

[1] "Pet. App." refers to the appendix to the petition, which is bound in a separate volume because of its unusual length.

Opinion on [Velsicol's] Petition for Rehearing" (App. B, Pet. App. 26-39) are not yet reported. The recommended decision of the Administrative Law Judge (App. D, Pet. App. 42-135) is reported in 41 Fed. Reg. 7555 (February 19, 1976). The decision of the Administrator of the Environmental Protection Agency (App. E, Pet. App. 136-208) is reported in 41 Fed. Reg. 7572 (February 19, 1976).

JURISDICTION

The judgment of the Court of Appeals (App. C, Pet. App. 40-41) was entered on November 10, 1976. A timely petition for rehearing was denied on January 6, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether § 7(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. 556(d), which places the "burden of proof" on "the proponent of a rule or order," permits the Administrator of the Environmental Protection Agency ("EPA") to shift the "burden of persuasion" to the party opposing the Administrator's proposed order for suspension of a pesticide registration.

2. Whether § 6(c) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. 136d(c) (Supp. V, 1975), was intended by Congress to be a statute which shifted the "burden of proof" to the party opposing a suspension order.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are reproduced as Appendix F, Pet. App. 209-224.

STATEMENT

This case involves the proper allocation of the "burden of proof" in administrative proceedings which can lead to an order by the Administrator of EPA suspending the registration of pesticides pursuant to § 6(c)(1) of FIFRA, 7 U.S.C. 136d (c)(1). In general, FIFRA provides that once a pesticide is "registered", it may be used for approved purposes until its registration is "cancelled", or is "suspended" pending the result of cancellation proceedings. 7 U.S.C. 136a. The Administrator can initiate proceedings to cancel a registration if he finds that the pesticide "generally causes unreasonable adverse effects on the environment", in which case the registrant is entitled to a plenary hearing. 7 U.S.C. 136d(b); 7 U.S.C. 136d(d).[2] If the Administrator finds that it "is necessary to prevent an imminent hazard during the time required for cancellation . . . proceedings", he may issue a suspension order which becomes effective only after an abbreviated and expedited hearing. 7 U.S.C. 136d(c)(1), (c)(2). Where the Administrator finds that "an emergency exists that does not permit him to hold a hearing before suspending," the Administrator may issue an emergency suspension order which takes effect immediately. 7 U.S.C. 136d (c)(3).

On November 18, 1974, the Administrator issued a notice of intent to cancel the registrations of chlordane and heptachlor, two pesticides produced by Velsicol. During the pendency of these cancellation

[2] Cancellation occurs automatically at the end of the 5 year registration period unless the registrant makes a request to continue the registration. 7 U.S.C. 136d(a).

proceedings, on July 29, 1975, the Administrator initiated a separate proceeding for a non-emergency *suspension* of these same pesticides pending the conclusion of the cancellation proceedings.

Pursuant to the administrative procedures required by statute for § 6(c)(1) suspensions, the petitioner was notified of the Administrator's proposed suspension order and given 5 days to request a hearing.[3] Velsicol made a timely request for a hearing on the Administrator's proposed suspension order. Pursuant to the statute which requires that the hearing commence within 5 days of the registrant's request,[4] prehearing conferences were held on August 6, 7 and 11, 1975, and the hearing before the Administrative Law Judge ("ALJ") was commenced on August 12, 1975.

The ALJ conducted the hearing pursuant to EPA's rule which places "the ultimate burden of persuasion" on the registrant opposing the suspension order. 40 C.F.R. § 164.121(g) (1975). On December 12, 19[illegible] after 43 days of hearing, the ALJ issued his recommended decision. He recommended dismissal of the notice of intention to suspend because he did not find that heptachlor and chlordane presented an "imminent hazard", within the meaning of the statute. Pet. App. 106-107, 135. On December 24, 1975, however, the Administrator purportedly accepted the ALJ's findings but overturned the ultimate conclu-

[3] Failure to request a hearing within the 5 day period permits the Administrator to issue the suspension order and forecloses the registrant from judicial review of the order. 7 U.S.C. 136d (c)(2).

[4] 7 U.S.C. 136d(c)(2).

sion[5] and suspended the registrations of the pesticides.[6] Pet. App. 139-140, 145, 199-203.

Velsicol petitioned for review of the Administrator's suspension order pursuant to 7 U.S.C. 136d (c)(4).[7] Velsicol challenged the Administrator's order on both substantive and procedural grounds, including the allocation of the "burden of proof". In its decision of November 10, 1976, the Court of Appeals essentially affirmed the Administrator's order. With respect to the "burden of proof" issue, the court ruled that EPA's allocation of the "burden of persuasion" to the registrant was consistent with Section 7(c) of the APA, 5 U.S.C. 556(d). Pet. App. 8-10.

Velsicol filed a timely petition for rehearing and suggestion for rehearing *en banc* arguing *inter alia* that the panel's ruling on the pivotal "burden of proof" issue had adopted a theory never briefed or

[5] The Administrator both brings the charges (contained in the notice of intent to suspend) and ultimately adjudicates whether they have been sustained. 7 U.S.C. 136d(c)(1); 7 U.S.C. 136d(d).

[6] The Administrator excluded a number of uses of the pesticide from the suspension order, finding that the benefits from these uses outweighed the risks. This portion of the Administrator's order, affirmed by the Court of Appeals, is of course not challenged by petitioner Velsicol.

[7] Velsicol's petition for review, originally filed in the Sixth Circuit, was transferred to the United States Court of Appeals for the District of Columbia Circuit and there consolidated with petitions filed by the Secretary of Agriculture and the Environmental Defense Fund ("EDF"). The Secretary sought the same relief as Velsicol while EDF sought review of the Administrator's decision to suspend only certain uses of the pesticides. Velsicol was an intervenor with respect to the Secretary's and EDF's petitions. Pet. App. 3-4.

argued by the parties.[8] While apparently acknowledging Velsicol's point, the Court of Appeals denied rehearing and issued a "Supplemental Opinion On Petition for Rehearing". App. B. The "Supplemental Opinion" reaffirmed the panel's original interpretation of § 7(c) of the APA finding that the "burden of proof" in the APA meant "burden of going forward rather than the burden of ultimate persuasion". Pet. App. 28. The court then advanced an alternate ground which had not been discussed in the original decision: the panel found that even if the APA would normally place the "burden of persuasion" on the agency, suspension hearings under FIFRA fell within the exception in § 7(c) of the APA in which the burden was "otherwise provided by statute."

REASONS FOR GRANTING THE WRIT

The writ should be granted to resolve the important question of the proper allocation of the "burden of proof" under § 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d). The significance of this question derives from the general applicability of the APA to virtually all federal agencies and from the fact that the allocation of the "burden of proof" will unquestionably have a substantial impact on the result of the administrative hearings affected. While it cannot be said that the Circuits are in direct conflict on the point, the approach adopted by the court below is analytically in-

[8] Neither the EPA nor the EDF had even attempted to defend EPA's regulation based upon the distinction between "burden of proof" and "burden of persuasion," which the Court of Appeals found to be crucial.

consistent with prior decisions of the Fifth [9] and Ninth Circuits [10] which have placed the burden on the proponents of orders without distinguishing between the "burden of proof" and the "burden of persuasion" in interpreting the APA. The decision below is also contrary to the interpretation accepted by the Second Circuit in *Kerner* v. *Flemming,* 283 F.2d 916, 921-22 (2d Cir., 1960) (Friendly, J.). The need for review by this Court is underscored by the continuing uncertainty on this point. *See, e.g.,* the divergent opinions in *Old Ben Coal Corp.* v. *Interior Board of Mine Operations Appeals,* 523 F.2d 25 (7th Cir., 1975).

The alternate holding of the Court of Appeals, interpreting § 6(c) of FIFRA, also has substantial significance because of its impact on the availability of pesticides which are essential to the agricultural economy. A clear indication of the importance of the pesticides involved here is the fact that the Secretary of Agriculture, who has been charged by statute with special responsibilities in this area, [11] also petitioned for review of the Administrator's suspension order. See Pet. App. 3-4.

1. The Court of Appeals erred in concluding that the Administrative Procedure Act permits the "burden of persuasion" to be placed upon Velsicol, the party *op-*

[9] *N.L.R.B.* v. *Atlanta Coca-Cola Bottling Company,* 293 F.2d 300, 309 (5th Cir.), *rehearing denied,* 296 F.2d 896 (1961).

[10] *United States* v. *Springer,* 491 F.2d 239, 242 (9th Cir.), *cert. denied,* 419 U.S. 834 (1974); *Kirby* v. *Shaw,* 358 F.2d 446, 449 (9th Cir., 1966).

[11] See 7 U.S.C. 136d(b) (Supp. V, 1975) (Pet. App. 221-23). The Secretary intervened as a party in the administrative proceedings below, and opposed suspension of the registrations.

posing the suspension order.[12] Section 7(c), of the APA, 5 U.S.C. 556(d), states:

> Except as otherwise provided by statute, *the proponent of a rule or order has the burden of proof* . . . (emphasis supplied).

In view of the plain and direct statutory language, the Court of Appeals' conclusion can be sustained only if the legislative history (i) explicitly distinguishes between the "burden of proof" and the "burden of persuasion" and (ii) establishes that Congress intended that the "burden of persuasion" could be placed upon the *opponent* of an order. The legislative history does not support this distinction and certainly does not indicate that the burden was to shift. To the contrary, the legislative history demonstrates that Congress considered and rejected the construction adopted by the court below.

The Senate Report, upon which the Court of Appeals places principal reliance,[13] does not recognize this distinction nor does it even suggest that the *opponent* of an order would have the "burden of persuasion." The Senate Report merely states that "parties [other than the party initiating the proceeding] who are proponents of some *different result,* also for *that purpose* have a

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[12] FIFRA clearly designates the Administrator to be the proponent of the order:

> If the Administrator determines that action is necessary to prevent an imminent hazard during the time required for cancellation or change in classification proceedings, he may, *by order,* suspend the registration of the pesticide immediately . . .

7 U.S.C. 136d(c)(1) (emphasis supplied).

[13] S. Rep. No. 752, 79th Cong., 1st Sess. 22 (1945), *reprinted* in S. Doc. 248, 79th Cong., 2d Sess. at 208 (1946).

burden to maintain" (emphasis supplied). The Report stands for the common-sense proposition that any party who seeks a substantive modification of a proposed order must bear the same burden of proof with respect to the modification as the originating party does with respect to the original order. The House Report,[14] which the Court of Appeals believed "confirm[ed]" the Senate Report, states that "every proponent of a rule or order or the denial thereof has the burden of coming forward with *sufficient* evidence therefor" (emphasis supplied). The House Report makes no mention of the "burden of persuasion," and surely does not shift the burden to the party opposing the order. In short, neither Report even recognizes the "burden of persuasion" as distinct from the "burden of proof" and they surely do not compromise the plain statutory language which provides that "the proponent of a rule or order has the burden of proof."

More illuminating is the change in the prior drafts of the APA, and the accompanying legislative history, which clearly indicate that Congress considered and ultimately rejected the interpretation of "burden of proof" adopted by the Court of Appeals. An earlier version of S. 7 provided,[15]

> The proponent of a rule or order shall have the *burden of proceeding* except as statutes otherwise provide.
>
> S. Doc. 248, supra, at 11, 158, (emphasis supplied).

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[14] H.R. Rep. 1980, 79th Cong., 2d. Sess. at 34 (1946), *reprinted* in S. Doc. 248, *supra,* at 270.

[15] S. 7 and its analog in the House of Representatives, H.R. 1203, were the bills which were amended and ultimately enacted as the APA. See S. Doc. 248, *supra,* at 11.

The Senate Judiciary Committee revised S. 7 to read:

> Except as statutes otherwise provide, the proponent of a rule or order shall have the *burden of proof*.
>
> S. Doc. 248, *supra,* at 30 (emphasis supplied.)[16]

Explaining this modification of the statutory language, the Senate Judiciary Committee stated:

> The provision relating to burden of proof is the standard rule.
>
> S. Doc. 248, supra, at 31.

The only interpretation of § 7(c) which is consistent with the statutory language, and with this legislative history, is that the Administrator as the proponent of the suspension order bears the "burden of proof"; and that the "burden of proof" encompasses the "burden of persuasion", not merely the "burden of proceeding" or going forward.

2. While the second issue, involving an interpretation of FIFRA is one of lesser overall significance, it nevertheless constitutes an extremely important question for the producers and users of agricultural pesticides. The court below was clearly wrong in its alternate holding that § 6(c)(1) of FIFRA was intended to allocate the burden of proof to the opponent of a suspension order.[17] The logic of the statutory framework established by the 1972 amendments to FIFRA and the incorporation of the APA "burden of proof" provision into the suspension section demon-

[16] With respect to the portion at issue here, the language ultimately approved by the Senate Judiciary Committee is identical to 5 U.S.C. 556(d).

[17] In response to Velsicol's petition for rehearing, the court below held for the first time that suspension orders fell into the exception in § 7(c) of the APA.

strate that Congress intended to dispel any doubt that the burden in *suspension* proceedings, unlike registration or cancellation proceedings, was to be on the Administrator.

The 1964 version of FIFRA placed the burden of proof on the registrant both in registration and in cancellation proceedings. *Stearns Electric Paste Corp. v. EPA,* 461 F.2d 293 (7th Cir., 1972). However, *Stearns* conspicuously did *not* place the burden of proof on the registrant in *suspension* proceedings though it explicitly noted that the registrant must shoulder the burden in the other proceedings involving registrants (namely initial registration, refusal to re-register, and all cancellation proceedings). 461 F.2d at 305, n. 38. Shortly after *Stearns* was decided, Congress specifically addressed this question in the 1972 amendments to FIFRA[18] which revised the statutory procedures for suspension orders by (i) requiring the expedited hearing procedures involved here,[19] (ii) eliminating the advisory committee procedures[20] *only* for suspension hearings, and (iii) subjecting *only* the suspension hearings to the requirements of the APA.[21] 7 U.S.C. 136d(c)(2).

The statutory framework established by the 1972 amendments makes perfect sense. It does not incorpo-

[18] P.L. 92-516, 86 Stat. 973 (1972).

[19] See pp. 4-5, *supra.*

[20] Compare 7 U.S.C. 135b(c) (1970 ed.) (Pet. App. 211-15) with 7 U.S.C. 136d(d) (Supp. V, 1975) (Pet. App. 220-21).

[21] 7 U.S.C. 136d(c)(2) provides in pertinent part:

> The [suspension] hearing shall be held in accordance with the provisons of subchapter II of chapter 5 of Title 5, except that the presiding officer need not be a certified hearing examiner.

rate the APA burden of proof provision in the sections of FIFRA covering registration and cancellation proceedings, in which the registrant has ample time to marshal the necessary evidence. 7 U.S.C. 136a(c); 7 U.S.C. 136d(a), 136d(b). However, the burden of proof is necessarily—and by express incorporation of the APA provision—placed upon the Administrator in *suspension* proceedings because the registrant has a maximum of 10 days notice to prepare for the suspension hearing, while the Administrator can muster all his evidence before initiating suspension proceedings.[22] For situations of true "emergency", Congress has authorized the Administrator to order immediate suspensions with hearings to follow. 7 U.S.C. 136d(c)(3).

Thus the evolution of FIFRA, and the present statutory scheme confirm that Congress intended that the Administrator have the burden of proof in suspension proceedings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
ROBERT L. WEINBERG
HAROLD UNGAR

WILLIAMS & CONNOLLY
1000 Hill Building
Washington, D. C. 20006
(202) 331-5000
Attorneys for Petitioner

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[22] In suspension proceedings, the registrant also loses the right he had in the 1964 version of FIFRA to have scientific questions referred to a neutral advisory committee. *See* n.20, ***supra***.